No. 09-3469

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DEMJANJUK,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

RESPONDENT'S OPPOSITION TO MOTION FOR STAY PENDING REVIEW
Agency No. A008 237 417

I. OVERVIEW

Petitioner has been advised by the Court that the materials filed yesterday, April 23, 2009,[1] may be incorporated by reference in this filing. Respondent

[1]On April 23, 2009, Respondent filed in case number 09-3416 a pleading entitled "Respondent's Submission in Response to Court's April 16, 2009 Order," accompanied by five exhibits and nine attachments. Respondent also filed motions to consolidate this case with case number 09-3416, hoping to keep all briefing and pleading in front of the panel that granted Petitioner a stay of removal on April 14, 2009.

respectfully requests that the Court consider all those materials and will not repeat here in full the matters presented therein.

At stake in the present litigation is the question of whether John Demjanjuk's long-overdue removal as a Nazi persecutor will be further delayed by his preposterous assertion that removal to the Federal Republic of Germany will subject him to conditions amounting to "torture" as defined by the Convention Against Torture (CAT). The government has proven to the satisfaction of a district court, an immigration judge, and the Board of Immigration Appeals (BIA), and this Court has confirmed that Demjanjuk is a Nazi persecutor who should be removed from this country and who is statutorily barred from seeking any relief against removal or deportation except deferral of removal upon proof of a CAT claim. A final order of removal is in place, and Petitioner's previous CAT claim relative to Ukraine was rejected on the merits by an Immigration Judge (IJ), the BIA. The government has twice in the month of April 2009 alone been within hours of removing him when courts issued stays of removal, causing specially chartered jet airplanes to depart the Cleveland area without him.

After fully a decade of denaturalization and removal litigation in which Petitioner has received due process throughout, the underlying question is, can the government execute this final order of removal or is it possible for this proven

Nazi persecutor to continue indefinitely to frustrate a legitimate and important governmental goal, ridding this country of Nazi persecutors, by continually filing meritless legal pleadings?

Petitioner, despite serving the SS during World War II as a guard at several infamous Nazi camps and contributing "to the process by which thousands of Jews were murdered by asphyxiation with carbon monoxide"[2] in the gas chambers at Sobibor extermination center in Nazi-occupied Poland, has had the very good fortune, by virtue of his lying to gain entry to the United States of America, of living a full life in this country, where he has prospered and survived to the impressive age of 89 years.

Our laws require that any Nazi persecutor be removed and denied any relief from removal except deferral of removal upon proof of a CAT claim. Our laws do not make an exception for individuals in their eighties who face declining health situations of the kind that persons of such advanced years commonly encounter. Indeed, our laws do not make an exception even for bedridden 89 year old men (although Petitioner is not, in fact, bedridden). Petitioner could have advanced this CAT claim 3 ½ years ago, when he made his failed CAT claim as to another

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[2] *United States v. Demjanjuk*, 2002 WL 544622 (N.D. Ohio Feb 21, 2002)(unpublished) at *8.

of the three countries specified in the 2005 removal order. Instead, he acknowledged in 2002 during a hearing on that CAT claim that it was not credible that he would be tortured in Germany.[3] Now, in a desperate bid to block his court-ordered removal, Petitioner argues that conditions in Germany have changed during the past 3 ½ years, with the result that now he would, in fact, face torture if sent there.

Petitioner asks this court to exercise its discretion to stay his removal (yet again), pending this Court's review of the BIA's April 15 decision denying his Motion to Reopen for consideration of his latest CAT claim. Hard-fought legal battles at every level of the federal judicial system, including before this Court and in appeals to the United States Supreme Court have uniformly rejected all of Petitioner's attempts to prevent denaturalization and removal. This Court may have discretion to stay the removal again to consider Petitioner's fanciful CAT claim, but as the Supreme Court explained two days ago, such discretion must be guided by sound legal principles.

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[3]Indeed, Demjanjuk's counsel has previously conceded that imprisonment in Germany would not constitute torture: "I'd like to contrast [removal of the respondent to the Ukraine] with, for example, if you were, if you were removing him to Germany where *no credible argument could be made that* in Germany – *in German prisons today,* fortunately, *torture occurs*." Tr. at 38 (emphasis added). *In the Matter of John Demjanjuk ,* No. 08 237 417(Cleveland Imm. Ct. Nov. 29, 2005, tr. at 38).

Respondent addressed those legal principles in yesterday's filings and incorporates all of those pleadings here. Respondent will herein only summarize those pleadings and highlight for this Court what Respondent submits are the most salient points and address new matters submitted by Petitioner in his new Petition for Review.

In deciding whether to exercise its discretion to stay the long overdue removal of John Demjanjuk, this Court should be, of course, mindful of what Petitioner is alleging but, just as important, what he is not alleging. He is not asking the Court to block his removal because, as he once argued, the government wrongly proved he was a former SS guard at Sobibor extermination camp where he participated in the mass murder of Jewish men, women and children.[4] He is not arguing, to this Court, that a chief immigration judge lacks the authority to enter a valid removal order. He is not asking the Court to block his removal because of any error by any lower court other than the April 15, 2009 BIA decision denying his motion to reopen so that he can assert an untimely and patently frivolous CAT claim. What he is asking is that this Court block his removal because, he says, he will be tortured in Germany. Respondent submits that should Petitioner succeed

[4]Demjanjuk has never admitted his service at Sobibor or other Nazi camps but no longer is litigating that issue.

in obtaining this stay, he will have once again succeeded in defrauding the United States, just as he did in 1952 when he immigrated here and in 1958 when he obtained his citizenship.

Simply put, Petitioner's argument grasps for one last straw to delay this matter further so that he can continue to enjoy his life in America until his dying day instead of being justly removed as the Nazi persecutor that he has been proven to be. Petitioner's argument lacks credibility or legal basis and borders on the absurd, yet he has twice succeeded in the last month in frustrating the legitimate efforts of the government to carry out a judicially affirmed final order of removal by obtaining last-minute stays of removal - both times from courts that lacked jurisdiction to issue such stays. Petitioner is seeking, in effect, to show the world that, even if the United States has the will to carry out the statutorily mandated removal of one who helped carry out lethal Nazi crimes of persecution, our legal system is so full of loopholes and pitfalls that such an individual may succeed in obtaining the only thing he really wants – to die in America, the country into which he gained entry by lying and in which he has so far found many decades of safe haven. His fraudulently procured life in America has allowed him to prosper and advance to old age despite having assisted in shortening the lives of literally thousands of innocent civilians in Nazi-occupied Poland.

Petitioner insinuated himself into the storied "huddled masses" welcomed by the Statue of Liberty in New York harbor. Thousands of victims of the Holocaust who rightly deserved safe haven from Nazi persecutors like Petitioner did not live to obtain that safe haven, but Demjanjuk tricked our nation into giving it to him by the lies he told to gain entry and citizenship. It would compound this terrible irony if Petitioner were to be permitted to further exploit the U.S. legal system so as to maintain that haven until he dies here.

II. LEGAL SUMMARY

In *Nken v. Holder,* 556 U.S. ___, 2009 WL 1065976 (April 22, 2009), the Supreme Court reiterated that the power to grant a stay of removal is a traditional power, inherent in a court's need to ensure proper execution of its orders. That power involves the guided exercise of discretion. In exercising that discretion, this Court must determine whether Petitioner has made a strong showing of success on the merits.

As this case's latest incarnation before this Court presents as a traditional review of a BIA decision, it is essential to examine what was submitted to the BIA and what the Board decided. Then this Court must determine if the BIA abused its discretion in denying the motion to reopen for purposes of asserting a CAT claim as to Germany. "The decision whether to grant or deny a motion to

reopen...is within the discretion of the Board ...." 8 C.F.R. § 1003.2(a). A circuit court accordingly reviews the Board's denial of a motion to reopen under an abuse of discretion standard. *E.g., Barry v. Mukasey,* 524 F.3d at 724; *Haddad v. Gonzales*, 437 F.3d 515, 517 (6th Cir. 2006) (collecting authorities). See *INS v. Doherty*, 502 U.S. 314, 323-24 (1992). As indicated above, Respondent submits that the CAT claim is completely devoid of merit and would be laughable were it not for the very serious nature of this case. Respondent's April 23, 2009 filing fully addressed the issues related to the CAT claim. As a matter of law, Petitioner cannot succeed on that issue. The Court should deny his motion for a stay because of this factor alone.

It is well-established that neither an alien's medical conditions, his physical removal by the United States, or another country's imposition of legitimate legal sanctions against the alien are cognizable under immigration provisions allowing CAT protection from removal, 8 C.F.R. § 208.16, *et seq*. Thus, the only issue on the Petition for Review is whether the BIA abused its discretion in finding that Petitioner had not made a sufficient showing justifying reopening because his argument that Germany intended to torture him was based upon mere speculation. In light of the Supreme Court's instruction in *Nken* this week that stays may not be predicated upon mere possibility and that the stay applicant bears the burden of

making a "strong showing that he is likely to succeed on the merits," *Nken* at *11, the BIA's finding cannot constitute an abuse of discretion.[5]

Much of what Petitioner raises in his new Petition for Review appears to address the potential conditions of his confinement, albeit clothed in his CAT claim. He submits a video recording made by a television station on April 14, 2009, the day U.S. Immigration and Customs Enforcement (ICE), Office of Detention and Removal Operations (DRO), took him into custody for removal.[6] He argues, in effect, that the U.S. government is already torturing him. This video was not presented to the BIA, so it cannot be part of the court's decision related to an abuse of discretion by the Board.

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[5]Contrary to Petitioner's contention, the BIA did not hold that Petitioner's Motion to Reopen was untimely because he is only eligible for CAT deferral. Rather, the BIA held that Petitioner's motion was untimely because he did not demonstrate materially changed circumstances, a prerequisite to the narrow exception to the 90-day deadline in 8 C.F.R. § 1003.2(c)(3)(ii).

[6]That video may very well be subject to a motion to strike as it was not presented below and is inappropriate for this Court to consider as part of the Petition for Review. In the interest of resolving the issues before this Court once and for all, however, Respondent will not ask the Court to strike the video, but as part of any review the Court conducts, asks the Court to compare Demjanjuk's purported inability to move without great pain in the presence of ICE personnel, family members, and a TV camera with Demjanjuk's robust, alert, and at times happy demeanor and far more agile physical condition as depicted in government's exhibit 4, submitted on April 23, a video recording that shows Petitioner during his time in ICE custody. That video was made, unbeknownst to him, within hours of the video he submitted.

As was argued in Respondent's April 23, 2009 filing, once this Court weighs the four factors governing stays of removal, the Court should determine that a stay is not warranted. Petitioner's new Petition for Review has little likelihood of success before this Court because he must convince this Court that the BIA abused its discretion in denying his motion to reopen in order to allow him to assert an untimely, unprecedented, unsupported, and, frankly, preposterous CAT claim. Not only does the alleged CAT claim itself border on the absurd, claiming that a western democracy that has indicated that it will detain Petitioner in a medical facility in order to, possibly, try him in its legal system will nonetheless torture him, but there is no legal merit to the claim as is discussed in Respondent's previous filing. Petitioner can show no irreparable harm since he can maintain his litigation, as noted by the Supreme Court in *Nken*, from Germany. The government's and the public's interest in finally removing this proven Nazi persecutor is strong and would be frustrated, perhaps permanently, by continued delay. The proper exercise of discretion here is for this Court to deny the requested stay of removal.

III. **NEW MATERIALS**

The primary new material that Petitioner presents in his new Petition for Review relates to ICE DRO taking him into custody on April 14, 2009 as the first

step toward actually removing him. This new material was not presented to the BIA and could not have been considered by that body in denying his motion to reopen.

As noted in Respondent's April 23 submission, Petitioner's health and the conditions of his transport to Germany are not cognizable as grounds for a CAT claim. However, this Court ordered submissions that pertain to the conditions of Petitioner's physical removal and to his health, and Petitioner continues to submit staged and provocative materials on this subject. Respondent wishes to ensure that if the Court considers Petitioner's health claims and the conditions of his arrest and removal, the Court also considers the evidence gathered by Respondent regarding Petitioner's health, which directly contradicts his filings. If this Court reaches the issue of Petitioner's health, arrest and removal (and it should not), the Court should also consider the submissions that accompany Respondent's April 23 filing, including the report of the ICE flight surgeon who examined Petitioner - a document that was filed under seal.[7]

1. The Evidence Demonstrates that Petitioner Is Malingering.

[7] An Addendum was attached to that filing. The Addendum fully describes the various exhibits and attachments, including the format of the videos and how they can be accessed and viewed.

Petitioner originally submitted to this Court a portion of a video recording made by his son on April 2, 2009. He refers to that submission as Attachment A in his current Motion for Stay Pending Review. That video was made during Petitioner's physical examination performed by Captain Carlos M. Quinones, MD, a certified flight surgeon and Program Manager and Clinical Director for the Division of Immigration Heath Services within ICE. Dr. Quinones' conclusions regarding that examination are attached as Respondent's Attachment I (a sealed document) to yesterday's filing.

In the video clip, Petitioner continuously moans and groans and appears to be in constant pain. He also appears to have difficulty moving about.

As part of his current Motion for Stay Pending Review, Petitioner submitted as attachment D a video recording made in his residence by television station personnel he allowed to enter and remain in his home while he was being taken into custody as the first step toward his actual removal. During that time, Petitioner once again continuously moans and groans and gives the impression of being in constant pain.

Respondent submits that Petitioner is malingering and offers a number of attachments and exhibits to prove the point. Review of the attachments and exhibits submitted proves that Petitioner is not in the dire medical straits that he

would like this Court to believe he is in. Petitioner's submissions should, instead, be seen as a continuation of the fraudulent conduct in which he engaged in immigrating to this country and in subsequently obtaining naturalization.

Respondent's video recordings and declarations show that when Petitioner was unaware that he was being watched and video-recorded, Petitioner exhibited little difficulty:

- opening and closing a car door,
- getting out of and into a car,
- walking unassisted to and from a building,
- reaching for items at a considerable distance,
- turning his body,
- getting out of a government-provided wheelchair without assistance,
- climbing into a pickup truck, and performing many other common activities he would like this Court to believe he cannot perform.

In addition, Petitioner exhibited impressive mental alertness. He carried on lucid conversations with ICE personnel and did not appear to be in "constant pain," in distinct contrast to what he claims to this Court and what he presents in his video submissions.

Instead of the feeble old bedridden man he depicts himself to be when he knows the media or others are watching, Petitioner is quite robust for a man of his age, as his own and Respondent's medical reports and the government's videos

and declarations demonstrate. His moaning and groaning cease when he has no need to act. His histrionics ceased for the majority of the time he was in ICE custody. As government exhibit 4 demonstrates, the moaning and groaning began again only when he was brought near a member of his family who had come to the ICE facility to transport him home upon his release from ICE custody on April 14.

None of the medical reports submitted by Petitioner support his claimed dire state of health. Indeed, the reports he himself has submitted belie his claims; none of his own doctors claim Petitioner is so ill or frail that he cannot travel. None of them conclude that he is "bedridden" or in constant pain. His own Attachment 2a (Medical report by Dr. Wei Lin) states that his "main complaint is weakness and his knee bothers him. His knee problem is pre-existing. He denies any chest pain, shortness of breath at rest or palpitations." Dr. Lin adds that "patient appears at his baseline, comfortable, not in distress" and that his "pulse [is] 64." His Attachment 2c (January 9, 2009 medical report by Dr. Timmappa Didari) concludes that Petitioner "says he was coming along okay" but that he complained of pain in his "right big toe and the middle of his foot." His Attachment 2d (also a report by Dr. Didare) indicates that he had been diagnosed with Myelodysplastic Syndrome (MDS) since 2004, *i.e., before* the 2005 litigation of his CAT claim, which mitigates against his claim of changed medical

circumstances. His Attachment 2e, a two-sentence letter from Dr.Giuseppe Antonelli dated April 6, 2009 - - *after* Petitioner filed his motion to reopen with the immigration judge - - states only, in conclusory fashion, that Petitioner has "severe spinal stenosis and arthritis with chronic back and leg pains which requires supervision and analgesics." The surveillance videos submitted by Respondent show that, this diagnosis notwithstanding, Petitioner is able to walk without assistance, get into and out of automobiles, and perform other routine ambulatory functions with comparative ease. He is, quite obviously, a vigorous man, particularly for his age. In short, Respondent submits that Petitioner is malingering and faking to deceive this Court and evoke empathy, all in hopes of persuading the Court to grant relief (namely continued residence in the U.S.) that Congress has forbidden to persons like Petitioner.

Lastly, in its filing yesterday, Respondent submitted but did not comment on a statement received from the German Embassy in Washington, D.C., Attachment H. This statement reflects that Petitioner will be detained, if at all, in a medical facility in Germany. His surmises and purported fears about how he will detained, like so much else that he has submitted to this Court, are baseless.

CONCLUSION

For all of the above-stated reasons, this Court should deny Petitioner's Motion for Stay Pending Review.

Respectfully submitted,

s/Robert Thomson
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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of April, 2009, the foregoing Respondent's Opposition to Motion for Stay Pending Review will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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